



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 210324-0064]

RIN 0648-BK33

Extension of Emergency Measures to Address Fishery Observer Coverage During the Coronavirus Pandemic

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; interim final action; request for comments.

SUMMARY: NMFS promulgates this interim final rule to revise the termination date of an emergency action that provides authority to waive observer coverage requirements. NMFS is taking this action to address public health concerns that relate to the ongoing Coronavirus (COVID-19) pandemic. The intended effect of the interim final rule is to provide NMFS with continued authority to waive observer coverage requirements when such action is necessary because of the COVID-19 public health emergency and mitigation measures taken in response to it. This interim final rule will also provide NMFS with continued authority to waive some training or other program requirements to ensure that as many observers as possible are available for deployment while ensuring their safety and health and that of observer program staff who train observers.

DATES: Effective March 27, 2021, through March 26, 2022. Comments must be received by [*insert date 60 days after date of publication in the FEDERAL REGISTER*].

ADDRESSES: You may submit comments on this document by using an electronic submission via the Federal e-Rulemaking portal. Go to <https://www.regulations.gov> and enter “NOAA-NMFS-2021-0011” in the Search box. Click on the “Comment” icon,

complete the required fields, and enter or attach your comments.

Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Wendy Morrison at 301-427-8564.

SUPPLEMENTARY INFORMATION:

Background

NMFS promulgated emergency observer waiver rulemaking in response to the COVID-19 pandemic on March 27, 2020 (85 FR 17285). That initial emergency action, hereafter referred to as the Observer Waiver Rule, was taken under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) emergency rulemaking authority at section 305(c)(3), 16 U.S.C. 1855(c)(3), and was effective for 180 days. The Observer Waiver Rule authorized waiver of observer coverage and training and some other program requirements. On September 21, 2020, due to the ongoing pandemic, NMFS extended the effectiveness of the Observer Waiver Rule for 186 days, or until March 26, 2021, as allowed under MSA section 305(c)(3)(B). 85 FR 59199. In promulgating the initial Observer Waiver Rule and extension, NMFS stated that if there was a need to continue waiver measures beyond March 26, 2021, it would further extend the Observer Waiver Rule. MSA section 305(c)(3)(C) authorizes NMFS to promulgate an emergency regulation that responds to a public health emergency. In this situation, the emergency regulation may remain in effect until the circumstances that

created the emergency no longer exist, provided that the public has an opportunity to comment after the regulation is published and that the Secretary of Health and Human Services concurs with the action. 16 U.S.C. 1855(c)(3)(C). Given the ongoing COVID-19 pandemic concerns and issues (expected to continue through at least mid-year 2021), the continued national and local declarations of emergency, and guidance from the Centers for Disease Control and Prevention, NMFS has determined that an extension of the Observer Waiver Rule is needed.

Therefore, this interim final rule revises the termination date of the Observer Waiver Rule to March 26, 2022, or until the Secretary of Health and Human Services (HHS) determines that the COVID-19 Pandemic is no longer a public health emergency, whichever is earlier. In the event of the latter case, NMFS will publish a notice of termination in the **Federal Register** for the Observer Waiver Rule as quickly as practicable following the declaration by the Secretary of HHS. 16 U.S.C. 1855(c)(3)(D). If such notice of termination were issued, NMFS does not intend to take additional public comment, as public comment on this rule will have been considered. In addition, if a notice of termination were issued, NMFS intends to delay the effectiveness of the termination, providing NMFS the authority to waive observer coverage for an additional 30 days. The Secretary of HHS, by memo dated February 25, 2021, concurs with the extension of the Observer Waiver Rule. NMFS solicits public comment on this interim final rule through [*insert date 60 days after date of publication in the FEDERAL REGISTER*], and will take into consideration any comments received as it evaluates whether any modifications to this interim final rule are needed.

This interim final rule only revises the termination date of the Observer Waiver Rule and does not change the waiver criteria. See the **Extension of Emergency Management Measures** section below for the criteria. For further background, see the Observer Waiver Rule, 85 FR 17285 (March 27, 2020), and extension, 85 FR 59199

(September 21, 2020), which includes responses to comments on the initial rule. This interim final rule will continue to advance the protection of and to promote public health and the safety of fishermen, observers, and other parties who may come in contact with those persons. NMFS will continue to consider applicable law and international obligations when making decisions about observer coverage waivers.

In issuing such waivers to date, NMFS has carefully monitored the status of the fishery and/or protected species that were being observed or monitored to ensure that the relevant conservation and management goals are still being met. NMFS is committed to maintaining the sustainable use of our marine resources, protecting endangered species, marine mammals, and seabirds, and providing seafood to the country during the ongoing COVID-19 pandemic. NMFS has and will continue to consider applicable law (*e.g.*, the Endangered Species Act and other statutes noted in the Classification section below) and international obligations when prioritizing observer coverage and making decisions about observer coverage waivers. NMFS has narrowly tailored waivers in terms of duration and scope. Thus, even where coverage has been waived, observers are being deployed and data are being collected on a subset of trips in these fisheries. The observer data collected on these trips can be compared with data collected in previous years to determine similarities and differences in catch between current and previous years and monitor the conservation and management goals of the fisheries. In addition, where possible, regional observer programs are making adjustments to increase observer deployments so that coverage goals are achieved on a seasonal basis.

With this interim final rule, NMFS will continue to carefully monitor the status of the fishery and/or protected species that are being observed or monitored to ensure that the relevant conservation and management goals are still being met under any reduced observer coverages. If needed to address any significant issues or concerns, or if NMFS determines that a waiver cannot be issued (*e.g.*, observer coverage is required due to

other applicable law or international obligations), NMFS will consider whether additional, separate actions (*e.g.*, fishery closures or additional monitoring) should be implemented per existing regulations or may issue emergency regulations, as necessary and appropriate. As a result, no ecological impacts are expected by this extension of the Observer Waiver Rule beyond any caused by the COVID-19 pandemic itself.

Extension of Emergency Management Measures

Under this interim final rule, NMFS will continue to have authority to waive observer coverage requirements if:

- Placing an observer conflicts with travel restrictions or other requirements addressing COVID-19 related concerns issued by local, state, or national governments, or the private companies that deploy observers pursuant to NMFS regulations; or
- No qualified observer(s) are available for placement due to health, safety, or training issues related to COVID-19.

If either condition is satisfied, NMFS may waive observer coverage requirements for an individual trip or vessel, an entire fishery or fleet, or all fisheries administered under a NMFS Regional Office (*see* 50 CFR 600.10 (defining Region) and <https://www.fisheries.noaa.gov/regions>) or NMFS Headquarters Office. In the September 2020 rule extension, NMFS made a minor change to the first waiver criterion and provided clarifications on issues raised by public comments on NMFS' application of the criteria. This interim final rule retains the criteria as revised, and approaches as clarified, in the September 2020 extension. As noted in the September 21, 2020 extension to the original Observer Waiver Rule, NMFS restates its policy that, under the first criteria, it will consider a trip waiver if the observer providers cannot meet the risk mitigation protocols imposed by a state on commercial fishing crew or by the vessel or vessel company on its crew. Based on its regulatory and contract oversight authority, NMFS

intends to ensure that observer providers and their observers and monitors are following the same risk mitigation protocols that fishermen are following.

NMFS will issue waivers as narrowly as possible, in terms of duration and scope, to meet the particular circumstances. Such waivers would be communicated in writing or electronic format. If, at any time, the circumstances that prompted the need for a waiver change to the extent that the waiver is no longer warranted, NMFS will communicate in writing or electronic format to withdraw the waiver. In making decisions regarding observer coverage waivers, NMFS will gather information, if needed, from relevant observer service providers and other parties involved with observer coverage before issuing the waivers.

This interim final rule will allow NMFS to waive certain observer training and other observer program requirements (*e.g.*, requiring a minimum class size, experience needed for a specific endorsement level, or requiring that observers transfer to other vessels between trips). Before doing so, NMFS will ensure that any such waiver does not remove requirements that ensure the health and safety of the observer or observer trainer.

Classification

This action is issued pursuant to section 305(c)(3)(C) of the MSA, 16 U.S.C. 1855(c), and pursuant to the rulemaking authority under other statutes that apply to Federal fisheries management or that implement international agreements. Such statutes include, but are not limited to, the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*), South Pacific Tuna Act of 1988 (16 U.S.C. 973 *et seq.*), Western and Central Pacific Fisheries Convention Implementation Act (16 U.S.C. 6901 *et seq.*), Antigua Convention Implementing Act (16 U.S.C. 951 *et seq.*), High Seas Fishing Compliance Act (16 U.S.C. 5501 *et seq.*), and Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*). This interim final rule is intended to authorize NMFS to waive any observer requirement implemented under any of those authorities, consistent with other applicable law. Consistent with MSA

section 305(c)(3)(C), this action will remain in effect as to all such requirements until March 26, 2022, or until the Secretary of HHS determines that the COVID-19 pandemic is no longer a public health emergency, whichever is earlier. If this interim final rule is no longer necessary under the latter condition, NMFS will publish a notice of termination in the **Federal Register** pursuant to MSA section 305(c)(3)(D).

Pursuant to 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3), the Assistant Administrator for Fisheries finds good cause to waive the otherwise applicable requirements for both notice-and-comment rulemaking and a 30-day delay in effectiveness for this interim final rule, which simply extends the effectiveness of the Observer Waiver Rule. The COVID-19 pandemic is unpredictable. Complications from a localized COVID-19 outbreak, or increases in community spread of virus mutations, combined with travel restrictions and other safety threats may unexpectedly create circumstances where it is logistically impossible to deploy observers or conduct elements of observer programs such as training that must be held in person. Fishermen are prohibited from fishing without required observer coverage, and certain observer deployments cannot proceed unless certain training requirements are met. Therefore, NMFS must have continued authority to waive observer coverage and other observer program requirements such as training. Given the unpredictable circumstances that could arise from the COVID-19 pandemic, any delay in this interim final rule could result in adverse economic impacts to fishers and impact their ability to supply seafood for the nation. Additionally, delaying this action could cause health and safety risks posed by continuing observer deployments and other related requirements during a COVID-19 outbreak.

NMFS solicited public comment when it promulgated the initial Observer Waiver Rule and responded to comments in the rule extension. For this interim final rule, NMFS

also solicits public comment and will take those comments into consideration as it evaluates whether any modifications to this rule are needed.

For the above reasons, NMFS finds it impracticable and contrary to the public interest to provide prior opportunity to comment on this interim final rule, and to delay its date of effectiveness.

OMB has determined that this interim final rule is significant under E.O. 12866 section 3(f). As such, NMFS has prepared a Regulatory Impact Analysis pursuant to E.O. 12866 section 6(a)(3)(B) and, given the COVID-19 public health emergency, section 6(a)(3)(D). The Regulatory Impact Analysis is available in the *regulations.gov* docket. This interim final rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and opportunity for public comment.

This interim final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

Dated: March 24, 2021.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.